Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN KENNETH STEIN,

Petitioner,

v.

WILLIAM D. ROBISON *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari To the Washington Court of Appeals Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner was convicted of serious felony crimes, and these convictions were shown in a civil case to a jury who proceeded to render a multi-million dollar verdict against him. The judgment creditor, at its own sheriff's sale, purchased your petitioner's interest in his father's estate and then agreed, in petitioner's stead, to settle a will contest. The convictions have since been reversed, which raises the following constitutional issue:

Whether the Due Process Clause requires a civil judgment and derivative rights of contract to be set aside when the rendering jury had been instructed to consider felony convictions against a defendant that were later reversed for violating his fundamental rights of due process.

2. An Oregon court admitted a 1987 will to probate, administered bonds found in the vault of an Oregon bank, and distributed those bonds to a Washington administrator who used them to pay estate taxes and attorney's fees. A Washington court ordered that the balance of the estate be distributed on the basis of a 1984 will, which raises the following constitutional issue:

Whether the Full Faith and Credit Clause obligates a forum to apply the law of a rendering state and make proportionate distributions among proponents of conflicting wills when the rendering court, on due notice but without contest, admits a later will to probate then distributes its *res* to the forum, which then decides to distribute the entire net estate to the proponents of an earlier will.

PARTIES TO THE PROCEEDING

The following individuals are parties to this case, which involves the administration of the Estate of Nicholas A. Stein: (1) John Kenneth Stein, also known as Jack Stein, decedent's only child; (2) William D. Robison, acting trustee under decedent's 1984 will; (3) Christopher Welch, administrator of decedent's estate in the State of Washington; (4) John Stein, decedent's grandson; and (5) Tami Stein, decedent's granddaughter.

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PETITION FOR WRIT OF CERTIORARI

Jack Stein respectfully prays that a writ of certiorari be issued to review the judgment of the Washington Court of Appeals in the matter of his father's estate.

In 1988 your petitioner was arrested and accused of soliciting murder. The trial court adopted a novel theory of culpability and did so without statutory or case-law authority. In its instructions to the jury, the trial court relieved the prosecution from its burden of proving beyond a reasonable doubt each element of the alleged crime. As a consequence, your petitioner was found guilty of three counts of attempted murder and one count of burglary.

The prosecutor acted in concert with local court officials to withhold transcripts from the Washington appellate courts. Consequently, your petitioner's appeal was dismissed for failure to perfect the record. A federal district court ordered the appeal reinstated. The Washington Court of Appeals assumed jurisdiction for the second time and—eight years after dismissing the first appeal—reversed the convictions.

Petitioner was arrested less than a year after his father's death. While he was held in custody, his adversaries made use of his arrest and imprisonment to have him removed as executor of his father's estate and have assets transferred from Oregon to Washington. One adversary made use of the convictions to obtain a civil judgment

which it used to seize petitioner's inheritance rights and settle this estate on the basis of a revoked will.

Although petitioner made diligent efforts, after reversal of the convictions, to restore the *status quo ante,* the Washington courts have denied him relief. When it came time for the Washington Court of Appeals to consider the constitutional issues set forth in this petition, it simply refused to do so. The issues are ripe for review, and they are well-grounded in doctrines developed by this Court.

OPINIONS BELOW

The decisions in the Washington probate case are reprinted chronologically in the first section of the Appendix beginning with the published interlocutory opinion of the Washington Court of Appeals, *Estate of Stein,* 78 Wn. App. 251, 896 P.2d 740 (1995) (App., *infra,* 1a-16a), *review denied,* 128 Wn.2d 1014 (1996), and ending with an order of the Washington Supreme Court denying discretionary review of the final decree. *Estate of Stein,* No. 71531-9 (Feb. 5, 2002) (App., *infra,* 54a). The final state judgment is an amended unpublished opinion of the Washington Court of Appeals. *Estate of Stein,* No. 24899-9-II (July 27, 2001) (App., *infra,* 45a-53a).

BASIS FOR JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. §1257. The "final judgment...by the highest court of a State in which a decision could be had" is the opinion of the Washington Court of

Appeals, Division Two, issued on July 27, 2001. There are two distinct constitutional issues raised in this petition:

The Full Faith and Credit Clause, U.S. Const., Art. IV, §1 (*infra,* 4), became an issue early in the case, when it became apparent that conflicting wills had been admitted to probate in Oregon and Washington. The Washington Court of Appeals considered this issue in its 1995 interlocutory opinion (App., *infra,* 11a-16a), and it directed the Washington probate court to distribute any Oregon property it might have received according to the terms of a 1987 Oregon will. Although the probate court specifically found that "certificates representing [investment] securities were [on the date of decedent's death] in the custody of the U.S. National Bank of Oregon in a branch in Portland, Oregon" (App., *infra,* 32a-33a), it nevertheless adopted a fiction that the *situs* of these securities was the State of Washington. App., *infra,* 33a. The court then denied a motion to restore proportionality among the proponents of the two wills. Petitioner therefore claims a deprivation of a "title, right, [and] privilege...under [Art. IV, §1 of] the Constitution." *See* 28 U.S.C. §1257(a).

The Due Process Clause, U.S. Const., Amend. XIV, §1 (*infra,* 4), became an issue in this probate case within five days after the reversal of the felony convictions. App., *infra,* 25a-26a. During the four months that remained until entry of the final probate decree, petitioner made diligent efforts to restore the *status quo ante.* He

filed a motion to vacate the civil judgment (App., *infra,* 102a-106a) and worked out a settlement with the judgment creditor. App., *infra,* 107a-108a. He then sought reinstatement of his challenge to the revoked will (App., *infra,* 28a-30a.), but his motion was denied without explanation. Petitioner therefore claims a deprivation of a "title, right, [and] privilege...under [Amend. XIV, §1 of] the Constitution." *See* 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article IV

Section 1—Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Amendment XIV

Section 1—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 28

Section 1738—*State and Territorial statutes and judicial proceedings; full faith and credit*

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other court within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Oregon Revised Statutes (1987 ed.)

Section 113.075—*Contest of will.*

When a will has been admitted to probate, any interested person may, at any time within four months after the date of the filing of the affidavit under ORS 113.145 or four months after the first publication of notice to interested

persons, whichever is later, contest the probate of the will or the validity of the will.

Section 113.145—*Information to devisees and heirs.*

(1) Upon appointment a personal representative shall deliver or mail to the devisees and heirs named in the petition for appointment of a personal representative, at the addresses therein shown, information that shall include:

(a) The title of the court in which the estate proceeding is pending and the clerk's file number;

(b) The name of the decedent and the place and date of the death of the decedent;

(c) Whether or not a will of the decedent has been admitted to probate;

(d) The name and address of the personal representative and the attorney of the personal representative;

(e) The date of the appointment of the personal representative; and

(f) A statement advising the devisee or heir that the rights of the devisee or heir may be affected by the proceeding and that additional information may be obtained from the records of the court, the personal representative or the attorney for the personal representative.

(2) If the personal representative is a devisee or heir named in the petition the personal representative is not required to deliver or mail the information under this section to the representative.

(3) The failure of the personal representative to give information under this section is a breach of duty to the persons concerned, but does not affect the validity of appointment, duties or powers or the exercise of duties or powers.

(4) Within 30 days after the date of appointment a personal representative shall cause to be filed in the estate proceeding proof by an affidavit of the delivery or mailing required by this section or a waiver of notice as provided under ORS 111.225. The affidavit shall include a copy of the information delivered or mailed and the names of the persons to whom it was delivered or mailed and the names of the persons to whom it was delivered or mailed.

Section 116.133—*Distribution; order in which assets appropriated; abatement.*

(1) If the will expresses an order of abatement, or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (2) of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(2) Except as provided in ORS 112.405 as to the shares of pretermitted children, and in ORS 114.105 as to the share of the surviving spouse who elects to take against the will, shares of distributees abate without any preference or priority as between real and personal property in the following order:

(a) Property not disposed of by the will.

(b) Residuary devises.

(c) General devises.

(d) Specific devises.

(3) A general devise charged on any specific property or fund is considered, for purposes of abatement, property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it is considered a general devise to the extent of the failure or insufficiency.

(4) Abatement within each classification is in proportion to the amounts of property each of the distributees would have received had full distribution of the property been made in accordance with the terms of the will.

(5) Persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute from that property unless the particular devise forms a substantial amount of the total estate and the court specifically orders contribution because of the devise.

(6) When the subject matter of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

Section 116.163—*Distribution to foreign personal representative.*

When administration of an estate in this state has been completed and the estate is in a condition to be distributed, the court, upon application by the personal representative, may authorize the delivery to the personal representative of an estate of a decedent pending in a foreign jurisdiction of such property as the court finds appropriate for the payment of debts, taxes or other charges or for distribution to the distributees of the estate in the foreign jurisdiction.

APPORTIONMENT OF ESTATE TAXES

Section 116.303—*Definitions for ORS 116.303 to 116.383.*

As used in ORS 116.303 to 116.383:

(1) "Estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the inheritance tax payable to this state under ORS 118.005 to 118.840.

(2) "Person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency or local governmental agency.

(3) "Person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It

includes a personal representative, guardian, conservator or trustee.

(4) "State" means any state, territory or possession of the United States, the District of Columbia or the Commonwealth of Puerto Rico.

(5) "Tax" means the federal estate tax and the inheritance tax payable to this state under ORS 118.005 to 118.840, and interest and penalties imposed in addition to the tax.

Section 116.313—*Apportionment among interested persons; valuations; testamentary apportionment.*

Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose. In the event the decedent's will directs a method of apportionment of tax different from the method described in ORS 116.303 to 116.383, the method described in the will shall control. A mere testamentary direction to pay debts, charges, taxes or expenses of administration shall not be considered a direction against apportionment of estate taxes.

Section 116.323—*Apportionment proceedings; equitable apportionment; penalties and interest; court determination.*

(1) The court in which the administration of the estate is proceeding may on petition for the purpose determine the apportionment of the tax.

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in ORS 116.313 because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the personal representative, the court may charge the personal representative with the amount of the assessed penalties and interest.

(4) In any suit or judicial proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with ORS 116.303 to 116.383, the determination of the probate court in respect thereto is prima facie correct.

Section 116.333—*Withholding of tax; recovery from distributee; bond of distributee.*

(1) The personal representative or other person who is in possession of the property of the decedent and who is required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to the person, the amount of tax attributable to the interest of the person.

If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with ORS 116.303 to 116.383.

(2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

Section 116.343—*Allowances for exemptions, deductions and credits.*

(1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purpose of the gift inures to the benefit of the person bearing that

relationship or receiving the gift; except that when an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or the estate of the decedent inures to the proportionate benefit of all persons liable to apportionment.

(4) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof in respect to property or interests includable in the estate inures to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in proportion as, the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or bequest does not constitute an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in ORS 116.313, and to that extent no apportionment shall be made against the property. This subsection does not apply to any case where the result will be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1954 (26 U.S.C. 2053(d)), as amended and in effect on January 1, 1969, relating to deduction for state death taxes

on transfers for public, charitable or religious uses.

Section 116.353—*Income interests; life or temporary interests; charging corpus.*

No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

Section 116.363—*Proceedings for recovery of tax; liability of personal representative; apportionment of amount not recovered.*

Neither the personal representative nor other person required to pay the tax is under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to that person until the expiration of three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the suit or proceeding within a reasonable time after the three-month period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to

the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

Section 116.373—*Foreign personal representatives and estates.*

A personal representative acting in another state or a person required to pay the tax who is domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

Section 116.383—*Construction.*

ORS 116.303 to 116.383 embody the Uniform Estate Tax Apportionment Act and shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

Revised Code of Washington

CRIMINAL PROFITEERING ACT

Section 9A.82.010—*Definitions.*

(4) "Criminal profiteering" means any act, including any anticipatory or completed offense, committed for financial gain, that is chargeable or indictable under the laws of the state in which the act occurred and, if the act occurred in a state other than this state, would be chargeable or indictable under the laws of this state had the act occurred in this state and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:

(a) Murder, as defined in RCW 9A.32.030 and 9A.32.050;...*

(12) "Pattern of criminal profiteering activity" means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events....*

Section 9A.82.100—*Remedies and procedures.*

(1)(a) A person who sustains injury to his or her person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity...*...may file an action in superior court for the recovery of damages and the costs of the suit, including reasonable investigative and attorney's fees.

(b) The attorney general or county prosecuting attorney may file an action: (i) On behalf of those persons injured or, respectively, on behalf of the state or county if the entity has sustained damages,...*

(c) An action for damages filed by or on behalf of an injured person, the state, or the county shall be for the recovery of damages and the costs of the suit, including reasonable investigative and attorney's fees.

(4) Following a determination of liability, orders may include, but are not limited to:...*

(d) Ordering the payment of actual damages sustained to those persons injured by...*...an act of criminal profiteering that is part of a pattern of criminal profiteering, and in the court's discretion, increasing the payment to an amount not exceeding three times the actual damages sustained.

(e) Ordering the payment of all costs and expenses of the prosecution and investigation of a pattern of criminal profiteering activity...*... incurred by the state or county, including any

costs of defense provided at public expense, as appropriate to the state general fund or the antiprofiteering revolving fund of the county....*

(6) A defendant convicted in any criminal proceeding is precluded in any civil proceeding from denying the essential allegations of the criminal offense proven in the criminal trial in which the defendant was convicted. For the purposes of this subsection, a conviction shall be deemed to have occurred upon a verdict, finding, or plea of guilty, notwithstanding the fact that appellate review of the conviction and sentence has been or may be sought. If a subsequent reversal of the conviction occurs, any judgment that was based upon that conviction may be reopened upon motion of the defendant.

STATEMENT OF THE CASE

Nicholas Stein died on August 23, 1987, having published a will in 1984 and another in the year of his death. Both wills designated small specific bequests. The 1984 will—published in Washington—gave one third of the residuum to your petitioner and the remaining two thirds to a trust for the exclusive benefit of decedent's two grandchildren. The 1987 will—published in Oregon—gave the entire residuum to your petitioner.

Eight days after decedent's death, petitioner filed the 1987 will with the Circuit Court of Oregon for Multnomah County. The Oregon court declared the 1987 will to be "last will of [Nicholas A. Stein]" and appointed petitioner to be executor of decedent's estate. App., *infra,* 59a.

Although the grandchildren received proper statutory notice, *see* ORS 113.145 (*supra,* 6-7), neither of them contested the 1987 will or moved for dismissal. Their right to do so expired after four months. ORS 113.075 (*supra,* 5-6). Although Tami Stein appeared in the Oregon court, she did so to seek an entirely different sort of remedy: an early distribution of her specific bequest under the 1987 will. App., *infra,* 60a.

Shortly after his appointment by the Oregon court, petitioner discovered that a portfolio of bond certificates had been stored by his father in the vault of a Portland, Oregon bank. He took custody of these certificates and filed an appropriate inventory with the Oregon court. The bonds had a market value of $819,766 on the date of decedent's death. This represented nineteen percent of the total value of the estate.

On March 7, 1988, a creditor filed the 1984 will with the Superior Court of Washington for Clark County. The Washington court declared the 1984 will to be decedent's last will.

On July 28, 1988, petitioner was arrested by Washington authorities on a charge of conspiracy to commit the aggravated first-degree murder of Thelma Lund, three counts of attempted first-degree murder with respect to Ned Hall, and one count of burglary.

As suspicions grew against him, petitioner was discharged from his Oregon executorship and was replaced with a special administrator. On November 30, 1988, the Oregon court entered its *Order Approving Final Account and Directing*

Distribution. Under authority of ORS 116.163 (*supra,* 9), the court directed that the Oregon property be distributed to the Washington administrator, respondent Christopher Welch.

The first criminal trial ended on December 16, 1988 with a mistrial. Four days later, the Estate of Thelma Lund filed a civil action seeking damages from petitioner for wrongful death.

The second criminal trial ended with an acquittal from the Lund murder charge but a conviction on each of the four charges related to Hall. On September 1, 1989, petitioner was sentenced to forty-five years in prison. He filed a timely appeal.

On December 20, 1989, petitioner filed a petition, from prison, to contest the 1984 will. Soon thereafter, in response to a court order, Welch filed a copy of the entire Oregon probate case. He did so in a format that complied with 28 U.S.C. §1738 (*supra,* 5). On motion of the grandchildren, the probate court dismissed the will contest, declaring it untimely. The Washington Court of Appeals agreed to review this decision. It was during this interlocutory appeal that petitioner first raised the issue of the Full Faith and Credit Clause.

On May 31, 1990, the Clark County prosecutor filed a civil action seeking damages from petitioner under the Washington Criminal Profiteering Act. RCW Ch. 9A.82 (excerpts, *supra,* 16-18). Over petitioner's objection, the prosecutor moved successfully to consolidate this case with the wrongful-death case. App., *infra,* 88a-89a.

On motion of the Lund Estate, the trial court ordered that the acquittal from the Lund murder charge be kept from the jury but that the jury be instructed—without hearing the name of the victim—that petitioner, on three occasions, did "attempt to commit the offense of Murder in the First Degree." App., *infra,* 90a-96a, 103a-104a. The court communicated this information by inserting typewritten answers onto the special verdict form before handing it to the jury. The jury responded with substantial verdicts for both plaintiffs.

On February 25, 1991, the court entered a judgment against petitioner in the amount of $12,536,795. This included a $4,000,000 award to the Lund Estate on its wrongful-death claim. App., *infra,* 97a-101a. Petitioner exhausted his right to appeal this judgment when the Washington Supreme Court issued an opinion affirming the trial court. *See Winchester v. Stein,* 135 Wn.2d 835, 959 P.2d 1077 (1998).

As these events unfolded, your petitioner attempted in vain to appeal the felony convictions. On September 17, 1991, the Washington Court of Appeals dismissed the appeal for failure to file clerk's papers and transcripts from the second trial. App., *infra,* 61a. The Court of Appeals took this action even though petitioner had made appropriate arrangements, long before, with the clerk and court reporter and fully paid for the requested services.

Petitioner sought habeas corpus relief from the United States District Court for the Western

District of Washington. The court convened an evidentiary hearing and announced its decision on May 15, 1995. App., *infra*, 62a-79a. It found petitioner blameless for the failure for perfect the record in the state appeal, assigning responsibility instead to the prosecutor, official court reporter, trial court clerk, trial judge, and petitioner's own counsel. The court ordered the appeal reinstated, but it abstained from considering errors alleged to have been committed at trial.

As petitioner struggled with his appeal in the criminal case, the Lund Estate proceeded to enforce its judgment. On June 22, 1992, it obtained a writ of execution directing the Clark County sheriff to sell your petitioner's interest in his father's estate. On November 7, 1994, the sheriff delivered a deed which conveyed to the Lund Estate petitioner's entire interest in a single parcel of real property belonging to the estate.[1]

On June 24, 1995, the Washington Court of Appeals concluded its interlocutory review of the probate case with a mandate that the will contest be reinstated. *Estate of Stein*, 78 Wn. App. 251, 896 P.2d 740 (1995). App., *infra*, 1a-16a. The Court of Appeals made the following statement with respect to the Full Faith and Credit Clause:

> If Nicholas Stein had assets within Oregon, then Oregon properly had jurisdiction and all Oregon assets, real or personal, will be distributed according to the terms of the

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[1]The deed included a 69-acre parcel belonging to the estate but excluded a 59-acre parcel.

> 1987 will, which the Oregon probate court held to be the last will of the decedent.

78 Wn. App. at 264 (App., *infra,* 16a).

During the next two years nothing of consequence occurred. The criminal appeal had been reinstated, as had the will contest. Both cases awaited final disposition.

On September 4, 1997, the grandchildren approached the probate court and requested that the Lund Estate, on the basis of its execution sale, be substituted for petitioner as real party in interest. Their motion was granted (App., *infra,* 17a-18a), and a few months thereafter the Lund Estate agreed with the grandchildren to dismiss the will contest. The Lund Estate accepted a one-third share of the estate under the terms of the revoked 1984 will. App., *infra,* 19a-23a.

The felony convictions were reversed on February 26, 1999. *State v. Stein,* 94 Wn. App. 616, 972 P.2d 505 (1999), *aff'd,* 144 Wn.2d 236, 27 P.3d 184 (2001).[2] The Court of Appeals noted in its opinion that the trial court had adopted a novel theory of criminal liability "based loosely upon the federal *Pinkerton* doctrine." 94 Wn. App. at 623 (App., *infra,* 81a). *See Pinkerton v. United States,* 328 U.S. 640 (1946) (holding a conspirator

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[2]Although the appellate courts limited their analyses to the defective jury instructions, they remanded other constitutional issues for consideration by the trial court. These other issues include the denial of choice of counsel, the denial of effective assistance of counsel, the denial of the right to a speedy trial, and the post-trial recantations of fellow defendants who had entered into plea bargains.

culpable for the reasonably foreseeable crimes of a co-conspirator). The Court of Appeals added that it found "no Washington cases citing *Pinkerton* as the basis for vicarious criminal liability." 94 Wn. App. at 624 (App., *infra,* 82a), *aff'd,* 27 P.3d at 190 (App., *infra,* 87a) ("the *Pinkerton* doctrine is inapplicable to Washington law.") Moreover, the *Pinkerton* "instructions were defective because they failed to include all the doctrine's essential elements." 94 Wn. App. at 625 (App., *infra,* 82a).

Three days after the announcement of this decision, Welch signed his *Final Report and Petition for Decree of Final Distribution.* The final hearing for the probate case was placed on the docket for June 30, 1999.

Petitioner took prompt steps to undo the collateral effects of the convictions. In particular he filed a motion to vacate the wrongful-death judgment (App., *infra,* 102a-106a), and he arrived at a settlement with the Lund Estate. The same judge who entered the wrongful-death judgment in 1991 signed an order on May 3, 1999 vacating the judgment *"ab initio"* and declaring the sheriff's sale "null and void." App., *infra,* 107a-108a.

After his settlement with the Lund Estate, petitioner filed timely motions to restore his standing in his father's estate, reinstate the will contest, and restore proportionality among the proponents of the two wills. App., *infra,* 27a-30a. The court granted him standing to make these motions but denied his substantive requests. The court included the following specific findings in its final decree:

> At Nicholas' death, certificates representing [investment] securities were in the custody of the U.S. National Bank of Oregon in a branch in Portland, Oregon....
>
> [Petitioner] Jack [Stein] received physical custody of those certificates from the U.S. National Bank at the location of Portland, Oregon, after Nicholas' death.

App., *infra,* 35a. The probate court also found, in seeming contradiction, that "[n]either Nicholas Stein's investment securities, nor any of his other property, was located in Oregon at his death." *Ibid.*

Petitioner filed a timely appeal raising both of the issues presented in this petition. The initial opinion of the Washington Court of Appeals contained a number of errors. In a motion for reconsideration, your petitioner requested that the Court of Appeals take judicial notice of the related cases, correct its errors, and decide the constitutional issues. App., *infra,* 45a-46a. The court granted the motion and issued an amended opinion. App., *infra,* 47a-57a. In this new opinion the Court of Appeals cured its errors of fact but continued to limit its analysis to a narrow aspect of petitioner's appeal—his argument that there was an improper substitution of parties because the sheriff's deed omitted some of the property owned by the estate. Although it is true that this particular issue first arose after entry of the final decree, each of the other issues—including the constitutional issues—were timely raised in the probate court. There is, moreover, no logical connection between these other issues and the

legal description in the sheriff's deed. The Court of Appeals nevertheless limited its analysis to the matter of the sheriff's deed, relegating the constitutional issues to a single sentence: "Because the settlement agreement stands, we need not consider the additional issues raised by Jack Stein." App., *infra*, 56a.

REASONS FOR GRANTING THE PETITION

Few controversies have demonstrated more error, delay, and inconsistency than the cases involving Jack Stein and the estate of his deceased father. The subject of this petition, the probate case, has given rise to two constitutional issues worthy of consideration by this Court.

The Due Process Issue

Although the subject of this petition is the probate case, the heart of the controversy is the criminal case. It was belatedly established by the Washington appellate courts that the felony convictions were the fruit of constitutional error. By the time of these decisions, the infirmity of those convictions had spread to related cases through the process of issue preclusion. The transfer of the Oregon assets, the multi-million dollar judgments, and the third-party settlement of the will contest all had their genesis in the criminal trial.

Although the Court of Appeals, in reversing the convictions, cited Washington cases, it was giving expression to constitutional principles developed by this Court. When the Court of Appeals attributed error to the novelty of the

Pinkerton instructions, it was applying the due-process doctrine of *Bouie v. City of Columbia*, 378 U.S. 347 (1964) and *Marks v. United States*, 430 U.S. 188 (1977). When the Court of Appeals criticized the instructions for relieving the prosecution from its burden of proof, it was enforcing *In re Winship*, 397 U.S. 358 (1970).

Although it is fair, therefore, to say that the reversal of the convictions was correct because petitioner had been deprived of his fundamental rights of due process, it is also fair to characterize the reversal as a half measure. The constitutional infirmity had taken root and was allowed by the Washington courts to spread to other cases, including the subject of this petition—the probate case.

This Court has concerned itself, on a number of occasions, with limiting the collateral effects of constitutional error. In *Burgett v. Texas*, 389 U.S. 109 (1967), the jury heard of prior convictions for which the defendant—in contravention of *Gideon v. Wainwright*, 372 U.S. 335 (1963)—did not have the benefit of counsel. This Court reversed the conviction and held that "the right to counsel, a 'specific federal right,' is being denied anew." 389 U.S. at 116.

It is true that *Burgett* has been limited by later decisions: An underlying conviction is generally not subject to collateral attack if a right of appeal has been waived or exhausted. *See Daniels v. United States*, 532 U.S. 374 (2001); *Custis v. United States*, 511 U.S. 485 (1994). Even so, this Court has given a clear signal in both of

these cases that a successful challenge to a prior conviction will be carried through to reverse the effects of issue preclusion. *Daniels,* 532 U.S. at 382; *Custis,* 511 U.S. at 497.

Your petitioner finds himself in a situation where his own underlying convictions *have* been reversed in a direct appeal that was delayed for six years by the misconduct of court officials.[3] By giving petitioner half the relief to which he is entitled, the Washington Court of Appeals has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This Court should grant the writ of certiorari to decide this timely and important issue.

If this Court rules in favor of your petitioner on the due process issue, it should set aside the order which ratified the settlement of the will contest. The Lund Estate had no right to agree to this settlement because its putative interest in this estate was the fruit of a wrongful conviction. The grandchildren, moreover, were not bona fide "purchasers" of their father's claim under the 1987 will. They had full knowledge of his claim of innocence and of the pendency of his criminal appeal.

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[3]The habeas corpus decision ordered the criminal appeal reinstated as if the 1989 convictions had actually taken place on the date of that decision. *Stein v. Wood,* No. C91-5523B (W. Dist. Wash. 1995). App., *infra,* 76a.

The Full Faith and Credit Issue

With the growth of interstate commerce and the increasing mobility of our population, it has become increasingly common for a decedent to leave property in more than one state. This has often led to disputes among parties who assert different rights under different state probate administrations. This Court has already decided significant issues in these types of cases:

1. A state may, consistently with the Due Process Clause, assert probate jurisdiction *in rem* over any property belonging to a decedent located within its borders. *Hanson v. Denckla,* 357 U.S. 235, 246 (1958).

2. A state may not, as a pretext to acquire jurisdiction *in rem,* adopt a fiction that personal property is located at the domicile of the decedent. *Id.* at 249 ("The fact that the owner [of personalty outside the forum State] is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction *in rem.*"). *Accord De Lano's Estate,* 181 Kan. 729, 315 P.2d 611, 623 (1957) ("A domiciliary state cannot acquire jurisdiction over out-of-state intangible assets by calling itself the *situs.*").

3. A state that exercises probate jurisdiction over property within its borders has exclusive authority to determine all issues pertaining specifically to that *res. Iowa v. Slimmer,* 248 U.S. 115, 120-121 (1918).

4. Conversely, the judgments of a state probate court have no "extra-territorial effect upon the assets in other states." *Riley v. New York Trust Co.*, 315 U.S. 343, 353 (1941) (citing with approval *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 400 (1917)).

5. A party may, however, be precluded from raising an issue in another state if the probate court first deciding that issue had jurisdiction *in personam* over that party. *Riley*, 315 U.S. at 353.

Oregon was the first state to exercise probate jurisdiction in the matter of the Stein Estate. The Oregon *res* consisted entirely of bond certificates stored by decedent in the vault of an Oregon bank. These bonds constituted nineteen percent of the value of the estate.

Oregon statutes permit an interested party to file a will and then seek an order *ex parte* declaring that will to be the decedent's last will. The order is subject to revision if an interested party files a challenge within four months after receiving notice of the probate case. ORS 113.075 (*supra*, 5-6). Similar procedures are found in most other states.

Although the grandchildren had proper statutory notice of the Oregon probate case, they filed no challenge to the 1987 will and raised no objection to the jurisdiction of the Oregon court.[4]

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[4]The grandchildren have argued before the Washington courts that Oregon declines subject-matter jurisdiction whenever the assets of a non-resident decedent consist entirely of personal property. *See West v. White*, 307 Or. 296, 766 P.2d 383 (Dec. 30, 1988), *aff'g*, 92 Or.

By neglecting to file a challenge within the four-month limitation period, the grandchildren have precluded themselves from denying that the 1987 will controls devolution of the Oregon *res.* *Underwriters Assurance Co. v. North Carolina Guaranty Ass'n,* 455 U.S. 691, 710 (1982) ("A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding."). *See also Durfee v. Duke,* 375 U.S. 106 (1963) (adopting "doctrine of jurisdictional finality" giving preclusive effect to a rendering court's decision regarding its own jurisdiction).

App. 401, 758 P.2d 424 (Aug. 10, 1988). However, *West* was decided after the August 31, 1987 order that admitted the 1987 will to probate and after the date on which ORS 113.075 barred any challenge to that order. Prior to *West* the Oregon courts accepted subject-matter jurisdiction over these types of estates. *See Vilas' Estate,* 166 Or. 115, 110 P.2d 940 (1941) (probate jurisdiction accepted when the only asset of a non-resident decedent within Oregon consisted of an insurance claim arising from a motor vehicle accident); *Thomas Kay Woolen Mill Co. v. Sprague,* 259 F. 338 (D. Or. 1919) (probate jurisdiction accepted when the only asset of a non-resident decedent within Oregon consisted of shares in an Oregon corporation). *West,* moreover, is distinguishable in that the prevailing parties filed a contest within the time permitted by Oregon law. 758 P.2d at 425 ("Pursuant to ORS 113.075, contestants objected to the probate of the will."), *aff'd,* 766 P.2d at 383 ("Within the time allowed by law, [contestants] filed a will contest."). Oregon strictly enforces the four-month deadline. *See e.g. Martin v. Kenworthy,* 92 Or. App. 697, 759 P.2d 335 (1988). The grandchildren concede that they had a full and fair opportunity to file a will contest. Tami Stein appeared in the Oregon court to request a distribution under the 1987 will. App., *infra,* 60a.

The Oregon court, unaware of the impending dispute between the two wills, administered its portion of the Stein Estate by restraining transfers of the bonds, permitting the purchase of real property and a loan by the executor, resolving creditor's claims, approving payment of Oregon inheritance taxes, and listing the distributees of the estate consistently with the 1987 will. As its final administrative act, the Oregon court distributed its *res* to Welch, the Washington administrator. The distribution to Welch complied with ORS 116.163:

> When administration of an estate in this state has been completed and the estate is in a condition to be distributed, the court, upon application by the personal representative, may authorize the delivery to the personal representative of an estate of a decedent pending in a foreign jurisdiction of such property as the court finds appropriate for the payment of debts, taxes or other charges or for distribution to the distributees of the estate in the foreign jurisdiction.

Welch sold the Oregon assets and exhausted the proceeds to pay for taxes and attorney's fees. Although he later sold the Washington assets, he distributed the net proceeds of those sales on the basis of the 1984 will. By approving these transactions, the Washington probate court acted in apparent violation of its mandate to distribute Oregon property on the basis of the 1987 will. *Estate of Stein,* 78 Wn. App. at 264 (App., *infra,* 16a). The court attempted to justify its actions by

adopting a fiction that "[n]either Nicholas Stein's investment securities, nor any of his other property, was located in Oregon at his death," and by finding that "the Oregon Circuit Court had no jurisdiction to conduct a probate administration of his estate." App., *infra*, 35a. This judgment stands in opposition to the aforementioned principles well-established by this Court (*supra*, 29-30).

In its review of the final decree, the Washington Court of Appeals decided to ignor the full faith and credit issue. By allowing the final decree to stand, the Washington Court of Appeals, by negative implication, "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This Court should grant the writ of certiorari to decide this timely and important issue.

The effect of these Washington decisions has been to strip the Oregon *res* of all judicial acts appurtenant to its administration by the Oregon probate court. But the Full Faith and Credit Clause requires Washington courts to give these Oregon "judicial proceedings...the same full faith and credit...as they have by law or usage in [Oregon]." 28 U.S.C. §1738.

Oregon has enacted statutes requiring the abatement of testamentary distributions so that each distributee (with exceptions that do not pertain) receives a proportionate share of the net estate when estate taxes and other administrative costs necessitate a reduction in the gross estate:

> The apportionment [of estate taxes] shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate.

ORS 116.313. *See generally* ORS 116.303-116.383 (Uniform Estate Tax Apportionment Act) (*supra,* 9-15); ORS 116.133 (other administrative costs) (*supra,* 7-8).[5]

If this Court rules in favor of petitioner on the due process issue and petitioner prevails in a subsequent will contest, the 1987 will would control devolution of the entire net estate. There would be no subsisting issue regarding the Full Faith and Credit Clause.

If, however, this Court rules in favor of petitioner only on the Article IV issue, full faith and credit should be given to "the judicial proceedings" of the Oregon probate court and to the "acts of the [Oregon] legislature" by giving effect to the Oregon abatement statutes. The distribution to the testamentary trust would be abated so that the percentage of the total administrative costs imposed against the Oregon *res* would not exceed the percentage it comprises of the total estate.

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[5]Washington has substantially identical statutes. RCW ch. 83.110 (1986) (Uniform Estate Tax Apportionment Act); RCW 11.56.160 (1965) (other administrative costs).

Preservation of Issues

It is unfortunate that the Washington Court of Appeals, in its review of the final decree, focused entirely on a single minor issue, the matter of the legal description in the sheriff's deed. Although the Court of Appeals correctly noted that this issue first arose after the entry of the final decree, the court incorrectly concluded that it "need not consider the additional issues raised by Jack Stein." App., *infra,* 56a. The full faith and credit issue is obviously independent of the legal description. It was interjected into the probate case even before the sheriff's deed was created—during briefing for the interlocutory appeal. Although it is true that the due process issue, because of the delay in the criminal appeal, came into the case much later, that issue remains independent of the legal description because it focuses on the judgment underlying the deed, not on the deed itself.

> The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts.

Street v. New York, 394 U.S. 576, 583 (1969).

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is

> to be regarded as having been adequately presented.

New York v. Zimmerman, 278 U.S. 63, 67 (1928).

> If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right...as if it had been specifically referred to and the right directly refused.

Chapman v. Goodnow, 123 U.S. 540, 548 (1887).

A constitutional error may permissibly be raised for the first time on appeal in Washington if it is "manifest," that is, if the facts necessary to adjudicate the error are in the record. *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted this 18th day of April 2002.

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